And yet this is a situation quite different from that of the case first put above. Here A has never entered into the relation of sale at all. But is there not an ample substitute for his actual assent? [16] It is reasonably apparent assent that is significant in contractual relationships.[17] And is not A's representation — whether by silence or positive affirmation — the equivalent from B's point of view of saying that A assents to the transfer by X of any interest which A has in the jewels? If this is so, the coincidence of assent of the owner and the change of possession effect a change of title precisely as in the first case above, and no adversion to estoppel is necessary to explain those results. It is admitted that this is not the language of the decisions; but it is suggested as a justification of them which does not partake of the somewhat nebulous nature of doctrines of "estoppel."

LABOR ORGANIZATIONS AND THE ANTI-TRUST LAWS. — A crucial problem of labor-union development was presented in the case of *Borderland Coal Corporation* v. *Gasaway*.[1] A West Virginia corporation sought an injunction on the ground that a combination to unionize the non-union coal mines of West Virginia and so to destroy their competitive advantage in the interstate bituminous coal market was in violation of the Sherman Act. In the District Court, Judge Anderson enjoined all unionization regardless of the methods employed, and enjoined the Central Competitive Field operators from collecting union dues under the check-off system. The Circuit Court of Appeals held that the injunction was too broad, since it included legitimate activities of the United Mine Workers, and that it should be confined to specific illegal methods of unionization, such as violent destruction of property, intimidation of employees, or inducing employees to violate "yellow dog" contracts.[2] The injunction against the check-off was also removed.

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within the meaning of the rule. See EWART, ESTOPPEL, pp. 195 *et. seq.* It is said that, "It is not the office of an estoppel to pass a title." See BIGELOW, ESTOPPEL, 5 ed., p. 609. But it is significant that Mr. Bigelow, whose thesis seems to be that a *bona fide* purchaser from the estopped owner is not bound by the estoppel, qualifies his example of this: "If a person stand by and allow his goods to be sold as the goods of another to one *who does not take possession*." See BIGELOW, *op. cit.*, p. 609. Italics are taken from Mr. Ewart's quotation of the passage. See EWART, ESTOPPEL, p. 203.

[16] Mr. Ewart distinguishes cases where (1) there is an inference that the owner is an actual party to the sale, and (2) there is only a representation. See EWART, ESTOPPEL, pp. 196, 248–249. This tends to answer the question in the negative.

[17] See WILLISTON, SALES, § 5.

[1] Borderland Coal Corporation *v.* Gasaway, U. S. (Dist. Ct. Ind.), decided Oct. 31, 1921, and Gasaway *v.* Borderland Coal Corporation, U. S. Circ. Ct. of Appeals. (7th Circ.), decided Dec. 15, 1921. Both opinions may be found in the CHICAGO LEGAL NEWS for Dec. 22, 1921. For the facts of this case see RECENT CASES, *infra*, p. 474.

[2] In setting forth the proper scope of the injunction the Circuit Court limits the application of the much discussed case of Hitchman Coal Co. *v.* Mitchell, 245 U. S. 229 (1917). See 31 HARV. L. REV. 648; 27 YALE L. J. 779. The court construes the "yellow dog" contract as requiring the employee merely to quit work if he joins the union, and therefore it refuses to enjoin propaganda seeking to have miners employed at will sever connection with their employer and openly join the union.

The question whether a labor union can violate the Sherman Act by peacefully expanding so as to secure nation-wide control of the labor supply in an industry largely devoted to interstate commerce has never been specifically answered.[3] If the complete unionization of such industries in itself constitutes a violation of the Sherman Act,[4] the injunction should have been upheld in its entirety, since the plaintiff can show damage through the destruction of the competitive advantage in non-union labor conditions. No doubt this powerful organization involves a restraint of trade, and would be illegal under a literal construction of the Sherman Act.[5] But it is the accepted view in dealing with combinations of capital that the words "restraint of trade" must be construed in view of the common-law background, and consequently that the Sherman Act strikes merely at an undue restriction of competition.[6] The question then becomes one of reasonableness. Its solution demands a consideration of all the facts of the particular restraint and a balance of the interests involved. A study of the coal industry reveals that the competitive advantage of the West Virginia fields rests in factors of geology and concentrated financial control in addition to labor conditions. Unionization would add to labor costs but would not drive the operators out of the interstate market. On the other hand, the use of this advantage in labor conditions means the exploitation of labor and threatens the disruption of the system of conciliation in the Central Competitive Field.[7] This system which brings relief from intermittent hostilities and presents an experiment in industrial co-operation, cannot function with West Virginia competing outside the field.[8] Stability

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[3] The decisions which have enjoined certain union practices or held labor unions liable for damages under the Sherman Act were rendered in cases which included recognized illegal activities, such as the use of secondary boycott or violence. Duplex Co. *v.* Deering, 254 U. S. 443 (1921); Loewe *v.* Lawlor, 208 U. S. 274 (1908); United Mine Workers *v.* Coronado Coal Co., 258 Fed. 829 (8th Circ., 1919); Dowd *v.* United Mine Workers, 235 Fed. 1 (8th Circ., 1916). However, there is an intimation in the case of American Steel Foundries *v.* Tri-City Trades Council, U. S. Sup. Ct., October Term, 1921, No. 2, that the benefit to the International Union is too remote and the control of interstate commerce sought too dangerous to make further extension of the United Mine Workers by any method legal; but the decision recognizes the right to unionize within a local competitive area.

[4] An initial problem under the Sherman Act is to find a restraint on commerce. If the distinction between commerce and manufacture set forth in the case of United States *v.* E. C. Knight Co., 156 U. S. 1 (1895), were accepted at face value to-day it would be hard to find a restraint on commerce in the principal case. The United Mine Workers have no connection with the coal industry aside from the mining operations and the restraint on labor supply is a step back of actual manufacture in the productive process. It seems proper to disregard technical distinctions between manufacture and commerce and look at the ultimate result of complete unionization which indicates an effective restraint on interstate commerce since West Virginia production is almost entirely for interstate trade. United Mine Workers *v.* Coronado Coal Co., 258 Fed. 829 (8th Circ., 1919).

[5] 26 STAT. AT L., c. 647.

[6] Chicago Board of Trade *v.* United States, 246 U. S. 231 (1918); Standard Oil Co. *v.* United States, 221 U. S. 1, 60 (1911); United States *v.* American Tobacco Co., 221 U. S. 106, 179 (1911).

[7] See SUFFERN, CONCILIATION AND ARBITRATION IN THE COAL INDUSTRY, 107.

[8] West Virginia clearly belongs in the same competitive area as the states in the so-called Central Competitive Field (Western Pennsylvania, Ohio, Indiana, and Illinois).

of labor conditions in the coal industry demands that the operators and miners arrive at trade agreements on a large scale, and unless Congress desires to provide governmental arbitration, it should not be held an unreasonable restraint of trade for labor unions to perfect the extensive organization requisite for such settlements. Therefore legitimate methods of unionization should not be held to violate the Sherman Act though the union seeks and attains a preponderant position in the industry.

But the balance shifts when the methods used involve violence, intimidation, and inducing breach of contract, and such tactics were properly enjoined under the Sherman Act by the Circuit Court.[9] The vital question in the case is whether when a large union engages in unfair practises the whole combination may be smashed as in restraint of trade. In dealing with preponderant units of capital, the courts have tended to grant dissolution where unfair practices were employed and not merely to enjoin such practices.[10] The social interest in industrial development through large combinations has been outweighed by the interest in keeping prices free from the influence of monopoly. But the social interest in the existence of labor unions as a means of removing inequality of bargaining power in the competitive struggle introduces here a further and decisive consideration. Consequently, the legality of the existence of the union, in spite of unfair practices, was recognized at common law,[11] and the Sherman Act should not be held to change the situation. The Clayton Act [12] makes this doubly certain by providing that the Anti-Trust Laws shall not be construed to forbid the existence of labor organizations or to prevent them from lawfully carrying out their legitimate objects.[13] The right to exist must include the right to increase its membership. Certainly a legitimate object of a labor union is to win recruits, and there is nothing in the Act to deny this protection to a national union on account of size or unfair practices. It seems paradoxical that the existence of a union cannot be attacked, but that when it once approaches a national scope it may not peaceably

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[9] The cases holding labor unions for damages or granting an injunction under the Sherman Act have recognized the right to organize by legitimate methods, though the illegal means were punished. Duplex Co. *v.* Deering, 254 U. S. 443 (1921); Loewe *v.* Lawlor, 208 U. S. 274 (1908); United Mine Workers *v.* Coronado Coal Co., 258 Fed. 829 (8th Circ., 1919). There is no authority for enjoining all methods of unionization or in effect smashing a union because of country-wide scope or illegal tactics.

[10] Nevertheless in a few cases where combinations of capital were involved the courts have enjoined the unfair practices but denied dissolution where the combination in other respects fostered the public interest. United States *v.* Hamburg-American Line, 216 Fed. 971 (S. D. N. Y.); United States *v.* Keystone Watch Case Co., 218 Fed. 502 (E. D. Pa.).

[11] Snow *v.* Wheeler, 113 Mass. 179 (1873). See COMMONS, PRINCIPLES OF LABOR LEGISLATION, 102. "Upon the question of the legality of trade unions *per se*, there is general agreement among the courts. In only two cases were unions held to be unlawful organizations."

Where there are no unfair practices the courts have uniformly upheld the right to unionize. Gompers *v.* Bucks Stove Co., 221 U. S. 418, 439 (1911); Diamond Block Coal Co. *v.* United Mine Workers, 188 Ky. 477, 222 S. W. 1079 (1920).

[12] See 38 U. S. STAT. AT L., c. 323, § 6.

[13] American Steel Foundries *v.* Tri-City Trades Council, U. S. Sup. Ct., October Term, 1921, No. 2.

urge others to join the organization. The Circuit Court recognizes this in an opinion vindicating the right of the United Mine Workers to unionize and to win recruits to the union cause by appeals to reason unaccompanied by violence or other illegal methods.

PUBLIC TORTS. — The division of criminal offenses into felonies and misdemeanors is not an adequate classification. Particularly in the application of the doctrine of *mens rea* have courts come to realize this fact. Several attempts have been made to establish new categories. Thus, actions for breach of police regulations have been termed *quasi*-criminal.[1] A further striking example is the division of offenses into crimes *mala per se* and *mala prohibita*.[2] Of late years a new classification of criminal offenses has been introduced, namely, public torts[3] and real crimes.

The term "public torts" refers to injuries to the state which are treated as analogous to civil injuries, actionable criminally either at common law or by statute. These include three classes of cases: injuries to public property, public nuisances, and police offenses.[4] The well-recognized right of the state to sue criminally for injuries to public property[5] rests on the historical disability of the state to sue for such wrongs in the civil courts.[6] Criminal action for public nuisances[7] falls within the same principle, since public nuisances in every case injure a property right of the state. In these cases it is necessary to look only at the nature of the act to determine whether it is a public tort. In statutory offenses, however, the legislative intent must govern. Violations of police regulations are ordinarily considered wrongs against the state not serious enough to constitute real crimes and are therefore treated as torts infringing the public interest in health and security.[8] But if the legislature considers the act sufficiently dangerous to the state to require punishment, it is a crime. Consequently the question whether a violation of a particular police regulation is a public tort or a real crime depends on whether the legisla-

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[1] See Wiggins *v.* Chicago, 68 Ill. 372, 375 (1873).

[2] See 1 BISHOP, NEW CRIM. LAW, 8 ed., § 295.

[3] See BEALE, CAS. CRIM. LAW, 3 ed., 81.

[4] See Sherras *v.* De Rutzen, [1895], 1 Q. B. 918, 921.

[5] Comm. *v.* Eckert, 2 Browne (Pa.), 249 (1812); Comm. *v.* King, 13 Met. (Mass.) 115 (1847).

[6] The state, on account of its supposed legal ubiquity, cannot be disseised, and therefore cannot maintain the direct action of ejectment or trespass to try title. State *v.* Stark, 3 Brev. (S. C.) 101 (1812); State *v.* Pacific Guano Co., 22 S. C. 50 (1884). See also State *v.* Paxson, 119 Ga. 730, 46 S. E. 872 (1904).

[7] King *v.* People, 83 N. Y. 587 (1881); Comm. *v.* Sharpless, 2 S. & R. (Pa.) 91 (1815). For other cases of public nuisances see 2 WOOD, NUISANCES, 3 ed., 1208.

[8] See Helena *v.* Kent, 32 Mont. 279, 290, 80 Pac. 258, 261 (1905); Brookville *v.* Gagle, 73 Ind. 117 (1880). At common law such action might be brought in debt or assumpsit. See 1 DILLON, MUNIC. CORP., 4 ed., § 409. See also Steinert *v.* Sobey, 14 App. Div. 505, 44 N. Y. Supp. 146 (1897); C. Beck Co. *v.* Milwaukee, 139 Wis. 340, 348, 120 N. W. 293, 295 (1909). But see *contra*, Pearson *v.* Wimbish, 124 Ga. 701, 52 S. E. 701 (1905); Stone *v.* Paducah, 120 Ky. 322, 323, 86 S. W. 531, 534 (1905).